

THE ENFORCEMENT OF THE ORDERS OF
STATE PUBLIC SERVICE COMMISSIONS

BY

GILBERT GILLESPIE LENTZ

Ed.B., Southern Illinois State Teachers' College, 1931
M.A., University of Illinois, 1932

AN ABSTRACT OF A THESIS

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN POLITICAL
SCIENCE IN THE GRADUATE SCHOOL OF THE
UNIVERSITY OF ILLINOIS, 1938

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PURPOSE OF THE STUDY

The purpose of this study has been to present a picture of the processes by which the administrative orders of an important type of regulatory commission are enforced. Emphasis has been placed upon the difficulties in enforcement experienced under various utility laws, the chief constitutional and administrative principles that have affected the development of enforcement procedures, and the effectiveness of various types of enforcement processes. An effort has been made throughout this study to distinguish the enforcement of legislative enactments, the enforcement of judicial decrees, and the enforcement of administrative orders; and to point out the extent to which enforcement of the latter has followed and deviated from the regular processes for the enforcement of determinations of the legislative and judicial branches of government.

The study has been based upon an examination of the utility laws of all the states, and consequently deals with a wide variety of procedures and agencies for enforcement. It has not been the purpose, however, to supply a complete catalogue of the enforcement powers and procedures in every state. The purpose, instead, has been to show the various types of procedure employed in the enforcement of orders and the methods most commonly used. The study has dealt almost exclusively with the orders of state public service commissions,¹ but the methods of the Interstate Commerce Commission and of other types of administrative bodies have been used in some cases for comparative purposes, and as furnishing precedent for many of the actions taken by the state public service commissions and by the courts in regard to them.

SOURCES OF INFORMATION

The chief sources of information have been the state utility laws, constitutional provisions creating and conferring powers upon the commissions, commission and court decisions interpreting these provisions and applying or denying enforcement, commission rules of practice and procedure, and statements of the commissioners, embodied in their official reports, as to practices and problems of enforcement. To these have been added general treatises deal-

¹ The term includes those state commissions with general jurisdiction over public utilities, called variously: railroad commissions, public service commissions, public utility commissions, corporation commissions, and commerce commissions. Some are also designated as boards of commissioners.

ing with administrative law and public utility regulation, special studies and articles dealing with particular state commissions, and correspondence with commissioners. Compilations and digests of public service commission laws which were made in 1912 and 1913 make it possible to draw comparisons between enforcement provisions today and those existing at the time the public service commission laws were first becoming general in their application.²

COURT ENFORCEMENT

The early state railroad commissions possessed only powers of an advisory nature. Their orders did not have the effect of law and the only method of enforcement was dependence upon the prestige of the commission to secure voluntary compliance, or the threat of prosecution for violations of the railroad law. Even when the legislatures attempted to confer upon the commissions the power to make binding orders, the orders, by court interpretation, became final only when sustained by courts of last resort, and the responsibility was placed upon the commissions to take the initiative in securing this judicial determination. Utilities were free to violate the orders until final determination had been made, and, in most cases, enforcement was a long and expensive process. The experience of the Interstate Commerce Commission and of these early railroad commissions revealed the defects in the then existing processes for securing compliance with orders, and led to a movement to give commission orders the effect of law and to provide more direct procedures for their enforcement.

Fundamentally there are two main types of enforcement for the orders of state public service commissions. One of these is a method whereby enforcement is dependent mainly upon the courts, through processes similar to those for the enforcement of state statutes. This includes the application of fines and penalties for a violation of orders as well as for violation of the utility law, the use of judicial writs to compel specific compliance, and enforcement through the courts of any civil liability that results from failure of a utility to comply with commission orders. The other general type of enforcement is one whereby the commission has been given summary or direct powers of enforcement, or has been given some of the powers of a court of record. This includes the power of the commissions to impose and collect fines for violation of their orders, and their power to fine and imprison for contempt.

² National Civic Federation, *Commission Regulation of Public Utilities*, 1913; National Association of Railway Commissioners, *Proceedings*, 48th Annual Convention, 1912.

The chief constitutional principles affecting the development of enforcement procedures for commission orders have been (1) the separation of powers, (2) the non-delegation of legislative power, and (3) the finality of administrative orders as affected by the requirement of due process.

The most important step in giving commission orders the "effect of law" has been the application of penalty provisions to violations of the utility law *or* any decision, order, rule or regulation of the commission. The penalty provisions in the early railroad laws were not made applicable to orders of the commissions, and therefore only the laws themselves could be enforced. Provisions for the enforcement of statutes do not in themselves constitute measures for the enforcement of commission orders, but the power to enforce their orders, on the other hand, gives to the commissions the power to enforce statutes by the simple device of ordering the utilities to comply with the law. The authority of the legislatures to delegate a limited rule-making power to the commissions has now been well established, but, as the commissions are not legislative bodies, they may not be empowered to determine whether the violation of these rules or orders is to be made a public offense.³ Only the legislature may define crimes, but the legislature may declare in advance that the violation of a commission order is to be a crime.

Public utility statutes in most of the states contain penalty provisions for the violation of certain types of orders, and a general penalty clause for other violations. The penalties vary in severity from \$25 to \$10,000 and imprisonment up to one year, and are generally made cumulative as to each act or each day's violation. The amount of the fine that may be prescribed by the legislature for violation of commission orders has, however, been subject to constitutional limitations. While it is clear that the legislatures may prescribe penalties for the violation of orders, the courts have, in some instances, declared the penalty provisions to be a denial of due process where they have been excessively heavy. In doing so they have distinguished between the application of penalties in cases where the authority of the state to regulate is clear and for which there is ample precedent, and in cases where the commission's order is valid only if it meets rather uncertain tests of reasonableness and due process.⁴ The penalties for violation of commission orders must not be so severe and assessed in such a manner

³ *People v. Grant*, 242 App. Div. 310, 275 N. Y. Supp. 74 (1934).

⁴ *Ex parte Young*, 209 U. S. 123 (1908); *Champlin Refining Co. v. Oklahoma Corporation Commission*, 286 U. S. 210 (1931).

as to preclude a fair opportunity for a review of the validity of the order. Heavy penalties, however, may be provided by the legislature if ample opportunity is offered for review of the order and if provision is made for remission of the fines during the period in which a *bona fide* effort has been made to secure judicial interpretation of the order. The mere cumulation of penalties will not generally invalidate the statute.⁵

A great part of the common law liability of public utilities and carriers has now been placed within the statutes. There is also provision in most of the states that the liability results from failure to comply with orders of the commission as well as from failure to comply with the utility law. Suits for damages against the violating utility may be brought in different forms within different jurisdictions and illustrate several degrees of commission participation. These forms are: (1) where the injured party goes directly into court with his suit against the violating utility, (2) where the commission first hears the complaint and certifies its record to the court, (3) where the commission sues on behalf of the individual, and (4) where the commission hears the complaint and may award reparation.⁶

The operation of the early railroad commissions soon demonstrated that the imposition of fines and penalties for violations of the utility law and commission orders was an inadequate means of enforcement. The full power of the commissions to secure compliance with their orders has come only after amendment of the utility laws so as to authorize the institution of suits for mandamus and injunction to compel specific compliance where this is the only adequate remedy. The earliest instance in which a writ of mandamus was issued to enforce the order of a railroad commission was in the case of *Railroad Commission v. Portland and Oxford Central Ry. Co.*⁷ The courts, however, generally denied the use of extraordinary writs to enforce commission orders unless the orders were, by statute, given the effect of legal obligations and use of the writs was specifically authorized. By 1913 the commissions in twenty-seven of the forty-three states that then had commissions were authorized to institute suits to compel compliance with their orders.

⁵ *Brooklyn Heights Ry. Co. v. Strauss*, 245 Fed. 132, P. U. R. 1918 A, 144 (1917).

⁶ The reparation award, even for those commissions with direct powers of enforcement, is a type of order enforceable by a court process. The award of the commission, as *prima facie* evidence, is the basis for a civil suit for damages brought either by the injured party or by the commission on his behalf.

⁷ 63 Me. 269, 18 Am. Rep. 208 (1874).

Today the use of the extraordinary writs has been authorized for most of the commissions.⁸

The language of the statutes authorizing the use of extraordinary writs to enforce commission orders varies between authorizing "suits in equity," writs of "injunction, mandatory, or otherwise," and "any appropriate writ," but in most cases the authority is sufficiently broad to authorize petitions either to compel or to enjoin action on the part of utilities. These suits, when brought at the relation of the commission, are generally given precedence over other civil cases in the courts. In approximately half of the states the suits may take precedence over all civil cases, while in most of the others they take precedence over all except election cases or suits for wages. The commissions themselves may not issue these judicial writs.⁹

Suits to compel compliance with orders are generally brought by the attorney-general at the relation of the commission, though many of the statutes provide that only an interested party may institute action for the writs. The accepted rule appears to be that the writs will lie at the relation of the attorney-general acting for and in the name of the state, unless some other adequate remedy is provided, or unless, as in some jurisdictions, the wording of the statute regarding the issuance of the writs is such as to preclude their issuance against private corporations or their officers.¹⁰ There is some difference in the attitude of the courts as to whether the issuance of the writs in enforcing commission orders remains entirely within the discretion of the court or whether there is now a clear duty to issue them in certain well defined classes of cases, but the nature of the writs permit a great degree of discretion on the part of the courts.

An important feature of this type of enforcement is the fact that the proceedings before the court result in a complete review of the order of the commission, both as to jurisdiction and reasonableness.¹¹ For this reason there is an inverse ratio between the number of suits instituted by the commissions to enforce their

⁸ The Georgia law contains no provision for suits to compel compliance, and the New Mexico statute contains only provision for removal of the order to the supreme court in case of refusal to comply.

⁹ Cf. *New Hampshire v. New Hampshire Gas and Electric Co.*, 86 N. H. 16, 163 Atl. 724 (1932); *Bentley v. Plainfield-Union Water Co.* (1918), P. U. R. 1918 F, 416 (N. J. Comm.); *DeKalb County Telephone Co. v. Redman, Mo. Pub. Ser. Comm. Reports*, 1913, p. 80.

¹⁰ *State ex rel. Daniel v. Broad River Power Co.*, 157 S. C. 1, 153 S. E. 537, P. U. R. 1930 A, 65 (1930).

¹¹ *State ex rel. Public Service Commission v. Skagit River Tel. and Tel. Co.*, 85 Wash. 29, 147 Pac. 885 (1915).

orders and the number of suits instituted by the utilities for the statutory process of review.

The practice of the commissions in instituting suits for mandamus or injunction indicates several general propositions. First, this procedure for enforcement is utilized to a surprisingly small extent, particularly in view of the large number of orders issued by some of the commissions.¹² Second, the procedure although a summary process before the courts, is by no means rapid, as most of the suits require two or three years before final determination, and some have required as many as ten years. Third, the suits, although long in process have in the greater number of cases resulted in the issuance of the writs against the utilities.

COMMISSION ENFORCEMENT

Summary enforcing powers have not often been granted to administrative agencies in the United States, and when such powers are conferred it is usually only for cases in which the public interest is vitally affected.¹³ The direct enforcement powers of the state public service commissions come through grants of power to the commissions to impose fines for violation of their orders and through the power to punish for contempt.

Although strong arguments have been advanced in an effort to demonstrate that the commissions possess an inherent power to punish for contempt, either through their legislative power to investigate or their judicial power to conduct hearings and render decisions, the courts have usually denied that administrative bodies possess any such inherent contempt power. Authority for what is called the contempt power of public service commissions follows two general plans. One is to grant to the commission, by constitutional provision or statute, direct use of the contempt power to be used as it is used by courts of record, not only to compel the appearance of witnesses and the production of evidence, but also to compel compliance with any order the commission may lawfully make. The other process is one whereby the courts may punish for contempt one who refuses to obey a commission order or subpoena. This type is generally limited to forcing the appearance and testimony of witnesses.

Although the courts have upheld a statutory delegation of the

¹² The New York Public Service Commission, for instance, issued 18,347 formal orders between the years 1924 to 1934. The commission instituted only four actions for mandamus or injunction to compel compliance.

¹³ Ernst Freund, *Administrative Powers over Persons and Property* (1928), p. 196.

contempt power to certain administrative agencies, they have in most cases denied it, and in what appears to be the only case in which the question was directly before the court in regard to a delegation of this power to a public service commission, the court declared the act to be invalid.¹⁴ Four states, California, Oklahoma, Louisiana, and Virginia, make a constitutional grant of the contempt power to the public service commissions. The states of Maine, West Virginia, and Texas, make the delegation by statute, but the commissions have not made extensive use of the power, and the constitutionality of the delegation has not been ruled upon by the courts. One other state, Arizona, provides that it is contempt of the commission for any person to fail to obey any order of the commission, but the fine is provided in the statute and is to be "recovered as penalties" in an action brought by the attorney-general in the superior court, and is, therefore, not unlike other penalty provisions in the law.¹⁵ In four other states the commissions have been given a limited power to punish for contempts committed in their presence, or to cite for contempt in order to enforce their subpoenas, but not to force compliance with their regulatory orders.¹⁶

The Supreme Court of the United States in the *Brimson* case,¹⁷ although denying the authority of Congress to delegate a direct contempt power to the Interstate Commerce Commission, upheld the statute that had empowered the circuit courts to punish for contempt one who refused to appear and testify before the commission. Theoretically, by this process, the court orders a person to obey his lawful duty (to appear before the commission) and punishes for contempt of court if he fails to do so. The offense is thereby transformed from contempt of the commission to contempt of the court. Since the *Brimson* case, statutes providing this indirect contempt process have generally been upheld, and it is now made available to a large number of the state commissions.

The four commissions that have, by constitutional provision, been given the power to fine and punish for contempt present a curious mixture of legislative and judicial powers, although in only two of these (California and Virginia) have the courts ruled specifically that the commission is a court of record. The California Railroad Commission has actual judicial powers and its cease and desist

¹⁴ *People v. Swena*, 88 Colo. 387, Pac. 271, P. U. R. 1931 C, 139 (1931).

¹⁵ *Rev. Code of Ariz.* (Stuckmeyer), 1928, secs. 731, 732.

¹⁶ Florida, Missouri, North Carolina, and Ohio.

¹⁷ *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 (1894).

orders are similar in effect to an injunction issued by a court.¹⁸ It has made frequent use of its power to fine and imprison for violation of its orders. The Virginia Corporation Commission has also been recognized as a court of record and may "enforce compliance with its lawful orders . . . by its own appropriate process."¹⁹ The commission has even exercised the power of judicial review in declaring invalid a section of the railroad law as a violation of due process.²⁰

The Oklahoma Corporation Commission proceeds under the contempt power for virtually all violations of commission orders. Its contempt orders, however, have been under the strict supervision of the courts, which are inclined to hold the commission to judicial procedure and the requirements of due process as laid down by the courts. The Supreme Court of Louisiana has maintained a supervisory jurisdiction over the contempt orders of the Public Service Commission of that state, and has implied that the contempt orders are to be used mainly to enable the commission to enforce its authority to summon witnesses and compel testimony, and not to enforce its regulatory orders. Partly because of this limitation, and partly because of other statutory provisions for enforcement, the Louisiana commission has not made great use of its constitutionally conferred contempt power. The possible invalidity under the Fourteenth Amendment of the direct contempt power of these commissions has not been ruled upon by the Supreme Court of the United States.²¹

ADMINISTRATIVE ASPECTS OF ENFORCEMENT

All of the commissions have been given the power to investigate, and at least to point out cases of violation of orders and to recommend that prosecution be brought. An important distinction, however, must be recognized between the action of the commission in requesting of the regular law enforcing officers that a suit to enforce be brought, and the action of the commission itself in actually bringing and prosecuting the suit. Both of these methods of procedure are used. In the older and more general method of prosecuting cases for violation of commission orders, the responsibility rests mainly upon the regular state prosecuting officers—the attorney-general, assistant attorney-general, and the district attorneys.

¹⁸ *Asbury Truck Co. v. Ball*, (Calif. Comm.) 9 P. U. R. (N. S.) 104 (1934).

¹⁹ *Va. Const.*, art. 12, sec. 156 (c).

²⁰ *In re Tidewater and Western Ry. Co.*, P. U. R. 1917 E, 798 (1917).

²¹ *Dicta* in the *Brimson* case (154 U. S. 447) had indicated that such a delegation of power by Congress would violate the due process clause of the Fifth Amendment.

By the other method the commission, through its own officers and staff, brings and prosecutes the actions in the name of the state, with but little aid from and little dependence upon the regular state prosecuting agents. Between these two general methods there are many combinations of kind and degree.

The commission members themselves have not taken an active part in the actual prosecution of cases. However, five of the states require that at least one member of the commission have legal training,²² and most of the commissions have at least one among their membership who possesses such qualifications, but only one of the states, Arkansas, provides for the institution of suits to enforce by the attorney member of the commission.²³

The position of the attorney-general in enforcement varies widely between states. The closest relationship between the commission and the attorney-general in enforcement is in those states where the attorney-general is the actual or ex-officio counsel for the commission. Nine of the states provide that he is to serve in this capacity. In other states the relationship between these two agencies in the matter of enforcement is through assistant attorneys-general appointed by the attorney-general or the governor, but whose duties are ordinarily under the direction of the attorney-general. In some of the states the courts have held that prosecution may proceed only through the attorney-general, and therefore, the members of the commission's legal staff have been made or are considered assistant attorneys-general. In Illinois, even the executive officer of the commission, an economics expert, has been made an assistant attorney-general.

In approximately one-fourth of the states the chief reliance for bringing suits to enforce commission orders lies with the commission counsel or special attorneys, and most of the commissions are represented to some extent by such counsel. Legal challenge has been offered to conferring the powers of prosecution upon these officers, and thereby diminishing the traditional powers of the attorney-general over suits to enforce, but the courts have usually held that the attorney-general's traditional powers are subject to modification by legislative enactment, and that special counsel appointed by the commission may be empowered to prosecute in the name of the state for the violation of commission orders.²⁴

²² Arkansas, Michigan, Virginia, West Virginia, and Wisconsin.

²³ *Digest of Stats. of Ark.* (Pope), 1937, ch. 36, sec. 2124.

²⁴ *Public Utility Commissioners v. Lehigh Valley Ry. Co.*, 106 N. J. Law 411, 149 Atl. 262, P. U. R. 1930 C, 407 (1930).

The position of the county or district attorneys in suits to enforce orders is not so important as that of either the attorney-general or the commission counsel. At the present time only a few of the commissions provide for enforcement through local prosecutors. More than half of the states provide that the district attorney may be called upon to aid the commission or the attorney-general in enforcement, but the aid given to these agencies usually comes from special counsel rather than from the district attorneys.

Five of the states provide for the office of people's counsel, whose chief duties are to represent utility patrons in drawing up complaints and in proceedings before the commissions, but upon whom have also been conferred some of the duties of prosecution before the courts. Special enforcement officers such as bailiffs and marshals are provided for those commissions that have powers of a court of record. These officers function for the commission in the same manner as do similar officers for the courts in serving process and executing judgments of the commission. Several of the states have recently ceased to prosecute through the attorney-general and have conferred these powers upon a general counsel for the commission, but the movement has not been widespread, and the general tendency has been rather to retain the system of prosecution through the attorney-general's office and to improve the relationship between that office and the commission by placing assistant attorneys-general at the disposal of the commission.

The administrative procedure involved in issuing and enforcing commission orders is prescribed partly in the public utility law and partly in the rules of practice and procedure which have been adopted to supplement the statutory requirements. All but three of the commissions have promulgated such rules.²⁵ The general features of these rules are similar among the commissions but there are a variety of procedures in the details of administration, particularly with respect to methods of making complaints and applications, notices of hearing and of compliance with orders, and the time within which they are to become effective.

The orders of all the public service commissions are subject to some degree of review by the courts, although there is much variance among the states in the level of the courts to which this review is to be taken and in the rules to be followed on appeal. Generally the utility law specifically authorizes an appeal from commission orders and prescribes the process by which it is to be brought, but

²⁵ Indiana, Massachusetts, and Minnesota.

even in the absence of such specific provision there are means, by the use of common law and equitable writs, by which the courts will assume jurisdiction to review and perhaps set aside unreasonable and unlawful commission orders.²⁶ The decision of the courts in reviewing commission orders may take one of four directions, depending upon statutory or constitutional provisions. The court may affirm the order, set it aside in whole or in part, modify it, or remand the case to the commission for further hearing and evidence. In fifteen of the states the court is limited to the alternative of affirming the order as it stands or setting it aside. Eight states restrict the court to decisions based upon questions of law, and in fourteen others the court may modify or revise the order as well as set it aside. Statutory limitations upon the bringing of appeals, precedence for commission cases, requirement of bond by appellants, limiting the record before the courts, and the restricted alternatives permitted the court in rendering judgments, have all had some effect in giving great weight to commission determinations.

CONCLUSIONS

The methods of enforcement for commission orders that have developed within the states have been influenced by several important factors. First among these has been the application by analogy of the procedures for enforcing state statutes to the enforcement of commission orders. When commission orders were given the effect of law, the processes for the enforcement of law were applied so far as they could be made applicable and effective. However, because commission orders are the result of a process different from that for the making of actual legislative or judicial determinations, and because they have been subject to different standards of validity, the procedures for their enforcement have been modified in the light of these differences. This modification to meet practical considerations has been the second main factor to influence the development of a pattern for enforcement. A third important factor has been the attitude of the courts toward commission enforcement and the part played by the courts in carrying out the procedures initiated by the commissions.

The use of direct enforcing powers by some of the state commissions has resulted in a complete disregard for the principle of the separation of powers and has caused anxiety on the part of some that it is a step toward the withdrawal of traditional safeguards

²⁶ The laws of Florida, Georgia, Kentucky, and New Jersey have no provision for review.

against administrative action. However, an examination into the practice of those commissions that have used direct powers of enforcement reveals little evidence that they have been used in an unwise and arbitrary manner. Fines and terms of imprisonment have been imposed by the commissions only in cases of flagrant violation of commission orders or the utility law, and the penalties have been invoked only after fair hearing and opportunity to "show cause" why they should not be applied. Further, the courts in these states have declared their power to set aside judgments of the commission should they be arbitrary. Subject to these restraints in actual practice, the methods of direct enforcement do not depart so seriously from the regular process of court enforcement as the statutes indicate.

On the other hand, examination of the practices for enforcement used by the stronger of the commissions which enforce through the courts reveals that they stand well in the effectiveness of their orders when compared to commissions with summary powers. The difficulties of which the commissions complain are more often for the lack of jurisdiction to order in certain cases where they believe there is the need for regulation than complaint as to the general effect of their orders when they have been issued. A comparison of direct with indirect enforcement leads to the conclusion that the solution for more effective enforcement lies more in the direction of improving the methods and procedures of the regularly established law enforcement processes than in granting summary powers to the commissions. It is desirable, however, that the relationship between the commissions and the courts be more clearly defined. The vast amount of litigation growing out of this indefinite relationship has led to confusion on the part of the commissions, the utilities, and the courts. Legislative clarification of much of this confusion could now be made, and with more accurate definition of the relationship between the courts and the commissions should come increased efficiency on the part of both.

VITA

Gilbert Gillespie Lentz was born at Marion, Illinois, on January 9, 1910. His parents moved to Carbondale, Illinois, in 1915, where he attended the public schools and graduated from the Community High School in 1927. He received the Ed.B. degree from the Southern Illinois State Teachers' college in 1931 and the degree of M.A. in Political Science from the University of Illinois in 1932. For the three school years from 1932 to 1935 he was employed as a teacher of history and civics at the Township High School of Herrin, Illinois. In June, 1935, he re-entered the University of Illinois where he has continued graduate study and served as an Assistant in Political Science since February, 1936.

